IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX

Appellants

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., ET AL.

Appellee

PETITION FOR REHEARING

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Appellee, Employers Liability Assurance Corporation, Ltd., prays that this Court grant a rehearing of its decision of December 6, 1954, reversing the judgment of the Lower Court, and further prays that, upon rehearing, the judgment below be affirmed.

REASONS FOR GRANTING A REHEARING

Your petitioner shows that the opinion and decision in this cause, rendered on December 6, 1954, sets forth precedents of such grave consequence in the field of contracts and conflict of laws as to warrant further consider-

ation on rehearing. Up to this time, an existing contract, valid and legal where made, has been upheld by this Court as valid elsewhere. The principles of freedom of contract and the sanctity of existing legal contracts have been rigidly protected. Whereas it has been recognized that a state might deny enforcement of a foreign contract in its courts when such contract offended local policy, this Court has never before permitted a State, on the grounds of public policy or otherwise, to re-write a contract, make it different and more onerous than the one validly entered into outside her borders, and then enforce the new product for the benefit of her own citizens, not even parties to the contract.

The underlying principle of Workmen's Compensation, that industry should bear the burden of injuries to workmen, does not apply to insurance. This Court has recognized that insurance is a business affected with a public interest, upon the theory that an insurance company is the stakeholder of the funds of its millions of policy holders, the losses of a few being spread over the shoulders of the public at large. Accordingly, this Court, with reference to insurance companies, has said:

> "Their efficiency, therefore, and solvency, are of great concern." *German Alliance Insurance Company vs. Lewis*, 233 U. S. 389, 412, 413.

Mr. Justice Black, speaking for the majority of this Court, in holding that the business of insurance is interstate commerce, said:

> "Individual policy holders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies." *United States v. Southeastern Underwriters Association*, 322 U. S. 533, 541.

Whereas the power of Louisiana to regulate its local insurance business has been recognized, Louisiana should not be permitted to tap and drain off the funds of the *national* insurance market, funds obtained through premiums paid for contracts elsewhere validly consummated, for the economic protection of its own third-party citizens at the expense of citizens of other states who contributed to the fund and who are not afforded equal protection.

Your petitioner, in its brief on the merits (pages 17-20), has demonstrated that in forty-four of the states, a direct action against the insurer is not permitted and the mention of insurance in a negligence action is reversible error. The jury's knowledge of the existence of insurance increases the award and tends to obscure the real issues in the case. The Louisiana Direct Action Statute increases the liability of the insurer in other ways, as clearly as if the statute increased the stated amount of coverage in the policy. By waiving the requirement of a final judgment against the insured, the injured party is permitted to recover from the insurer in many instances in which he could not obtain a judgment against the insured. This is well demonstrated by the following

statements of the Louisiana Supreme Court in the case of *Edwards v. Royal Indemnity Company*, 182 La. 171, 161 So. 191:

> "Let us suppose, in the instant case, that the insured had been a minor twenty years of age or an interdict. No action could have been maintained against him, but, certainly, the injured party could sue the insurance company which could not plead the minority or interdiction of the insured as a defense."
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> "It appears that the theory of the articles of the Civil Code and Code of Practice, which prohibit the wife from suing her husband during marriage, except for divorce, separation, etc., is that litigation between them would tend to promote domestic troubles and unhappiness, as well as confusion in the finances of the family group. But these reasons were entirely eliminated from consideration when the Legislature created a direct right of action in favor of the claimant against the insurance company alone."

The Louisiana statute changes the fundamental nature of the insurer's liability from one of indemnity to its insured to one of direct liability to the injured third-party. In operation, this results in loss of personal defenses against the insured, such as failure to receive prompt notice of the accident. In *West v. Monroe Bakery*, 217 La. 189, 46 So. (2d) 122, the Louisiana Supreme Court has held that failure of the insured to give notice to the insurer cannot deprive the injured party of the right of direct action which enured to his benefit upon the happening of an accident. In fact, any personal defenses

between the insurer and the insured cannot defeat the injured party's claim. Accordingly, the Louisiana statute not only invalidates the "no action" provision of the policy, but also nullifies Conditions 9, 10 and 11 of the policy (R. 57), providing for prompt notice of the accident, immediate notice of a claim or suit, and assistance and cooperation of the insured. An insurance company's rights to receive prompt notice of the accident and any claims resulting therefrom, to enforce cooperation and assistance of the insured, to postpone liability until judgment has been obtained against the insured, and to insure impartial determination of liability before a jury without the insurer present, have been repeatedly upheld in at least forty-four of the states. The due process clause of the Constitution assures that no state has the power to deprive any citizen of such substantive rights acquired from contracts elsewhere validly made.

With reference to the problem of balancing interests under the full faith and credit clause of the Constitution, it is submitted that the interests of the State of Massachusetts in protecting the solvency and efficiency of insurance companies, as stakeholders of public funds, outweighs the interests of the State of Louisiana in protecting the *financial* well-being of its own citizens, including its doctors and hospitals. This Court, in its opinion of December 6, 1954, has emphasized the interest of Louisiana in providing for the "recovery of damages" by third-party injured persons. Obviously, the Louisiana statute does not protect citizens of Louisiana from injury nor does it tend to decrease accidents. The statute is

simply designed to assure the payment of money by the insurer. Viewed in this light, it is not possible to distinguish this case from the case of *Hartford Accident & Indemnity Company v. Delta & Pine Land Company*, 292 U. S. 143. The "casual payment of money in Mississippi" referred to in that case (292 U. S. at page 150) is no different from the payment of "damages" referred to in the present case. In the *Hartford* case, the suit was between the actual parties to the contract. In this case, the suit is between one of the parties and an outside third party in direct violation of the admittedly valid terms of the contract. It would appear that the *Hartford* case is directly in point and should control.

The power of a state to regulate insurance corporations doing business therein is well recognized, but such regulation should be limited to the state in which the insurance policy is written, the amount of premiums computed, and the losses adjusted. Dual or multiple regulations of insurance contracts by several states cannot be permitted without seriously affecting their efficiency. For this reason, Congress expressly intended to limit the power of states in this respect in the passage of the McCarran Act. The House Report on the Bill, quoted on page 36 of appellee's brief on the merits, is squarely in point and expresses clear congressional intent to prohibit any state from regulating contracts validly entered into in other states. That report was considered by this Court to be "decisive" in the recent case of *Maryland Casualty Company v. Cushing*, 347 U. S. 409, 413. It should be equally decisive of the present case. Louisiana cannot

exercise greater powers than have been conferred upon her by Congress in the McCarran Act without being guilty of placing an unconstitutial burden on interstate commerce by this regulation of foreign insurance contracts.

Your petitioner, in its brief on the merits, emphasized the fact that the insured in this case is not qualified to do business in Louisiana to clearly show that Louisiana's connection with the insurance policy is slight. It is true that the Louisiana statute provides a convenient forum for the trial of claims by Louisiana citizens, but it would appear that the interests of the State of Illinois in requiring that its citizens be sued at their domiciles would outweigh the interests of Louisiana in this respect. The opnion of this Court does not take into consideration the fact that even though a foreign insured is qualified to do business in the State of Louisiana and has an agent for service of process there, nevertheless the injured party invariably joins the insurer as a party to the suit or elects to sue the insurer alone to gain the manifest advantage arising from the prejudice of juries toward insurance companies. Any serious disadvantage to Louisiana citizens in obtaining judgment against a foreign assured would seem to be overcome by the provisions of Section 1404 (a), 28 U. S. C. (incorporating the doctrine of Forum Non Conveniens). In the absence of a policy of liability insurance, this Court clearly would not hold that Louisiana could subject a citizen of Illinois to trial in Louisiana courts simply because loss under a contract happened there. In that situation, however, the interests of Louisiana would appear to be the same.

The fact that your petitioner was forced to comply with the Louisiana "Consent" Statute does not provide a sound basis upon which to rest the decision of this Court. Since the Direct Action Statute does deprive the insurer of property without due process of law and does violate the full faith and credit clause, any attempt to apply the "test of reasonableness" in this situation would be incongrous. Obviously, the deprivation of any Constitutional right is unreasonable. Your petitioner's position in this respect is well stated in the minority opinion of Mr. Justice Day in the case of *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 244, 266, 267, in the following language:

> "If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the state may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation: 'You may do business within this state, provided you will yield all right to be protected against deprivation of property without due process of law, or provided you surrender your right to have compensation for your

> property when taken for private use, or provided you surrender all right to the equal protection of laws,' and so on through the category of rights secured by the Constitution, and deemed essential to the protection of people and corporations living under our institutions. *This dangerous doctrine*, asserted in the majority opinion in the *Doyle case*, destroyed and overthrown, as we think, in *Barron v. Burnside*, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and state, from that day to this, *ought not now to be rehabilitated and restored to its power* to work destruction of rights deemed essential to the safety of citizens, natural and artificial, that they have been secured by the provisions of the Federal Constitution."

In *Terral v. Burke Construction Company*, 257 U. S. 529, 533, the Court stated that *Security Mutual Life Insurance Co. v. Prewitt*, supra, was overruled and that the views of the minority judges in that case have become the law of this Court. The cases of *Aetna Life Insurance Co. v. Dunken*, 266 U.S. 389, and *New York Life Insurance Co. v. Head*, 234 U.S. 149, 163, are closely analogus to the present case.

The Louisiana Direct Action statute, in addition to depriving the insurer of property without due process of law, burdensomely regulates interstate commerce and projects its powers into the domain of other states, as above demonstrated. Accordingly, even under the standard of reasonableness, the "Consent" Statute is equally unconstitutional.

CONCLUSION

For the foregoing reasons, Employers Liability Assurance Corporation, Ltd., prays that this petition for rehearing be granted and that upon rehearing, the judgment of the Lower Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that the same is filed pursuant to Rule 58 of the Rules of this Court.

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